IN THE COURT OF APPEALS OF IOWA 000409

No. 7-511 / 96-2297

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CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

EDWARD NATHANIEL QUINN,
Appellant.

Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

Edward Quinn appeals the judgments and sentences entered upon jury verdicts finding him guilty of possession with intent to deliver cocaine, failure to possess a drug tax stamp, terrorism, felon in possession of a firearm, carrying weapons, and false imprisonment. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John Sarcone, County Attorney, and Jeff Noble, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Huitink and Streit, JJ.

STREIT, J.

Defendant, Edward Quinn, appeals his consecutive sentences to convictions for five felonies because the trial court did not adequately state the reasons for imposing consecutive sentences. Quinn also appeals the court's denial of his motion for new trial based on new evidence and brings an ineffective assistance of counsel claim. We affirm the court's denial of Quinn's motion for new trial, but remand for resentencing. The ineffective assistance claim is preserved for further review.

I. Background & Facts.

On the morning of December 15, 1995, Quinn went to the home of Tina Brown and her boyfriend, Kimmy Smith, to get Brown to go with him to a court hearing that day. Quinn, Brown, and Smith argued. A gun in Quinn's pocket discharged in Smith's direction. Brown went with Quinn and the others against her will. After they left, Smith called the police.

Quinn, Brown, and the others drove to a Quik Trip where Brown purchased some cigarettes. Another man joined them in the car, allegedly to buy drugs. The group drove away and was stopped by the police. After Quinn got out of the car, he dropped his hat on the ground and then picked it up. The officers conducted a search and found Quinn's handgun under the front passenger seat where he had been sitting and approximately two grams of rock cocaine in a cigarette wrapper underneath the car.

Quinn was charged with possession and intent to deliver cocaine, failure to possess a drug tax stamp, terrorism, felon in possession of a firearm, carrying weapons, and false imprisonment. On the first day of trial, Quinn filed a motion for continuance to secure more witnesses. The court denied the motion. Quinn's motion for judgment of acquittal was denied by the court. The case was submitted to a jury. The jury found Quinn guilty on all counts. Quinn moved for new trial based on newly discovered evidence. The motion was overruled. Quinn was sentenced to consecutive terms of five years each for the crimes of failure to possess a drug tax stamp, terrorism, and felon in possession of a firearm, and up to one year for false imprisonment.

II. Motion for New Trial.

Quinn contends the district court abused its discretion in denying his motion for new trial based on newly discovered testimony from his wife and sister. Quinn's wife and sister testified Tina Brown admitted to lying at Quinn's trial. Review of the denial of a motion for new trial based on newly discovered evidence is for abuse of discretion. *State v. Jefferson*, 545 N.W.2d 248, 249 (Iowa 1996). Trial courts are in the best position to determine whether new evidence will lead to a different result at trial. *State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996). The court's discretion in granting or denying a motion for new trial is "unusually broad" when the new trial

motion is grounded on newly-discovered evidence. *State* v.*Miles*, 490 N.W.2d 798, 799 (Iowa 1992).

Quinn's first hurdle in having the new proffered testimony admitted is the hearsay rule. The testimony of his mother and sister is hearsay. There is doubt as to whether the new proffered testimony would have fit under a hearsay exception.

Assuming Quinn was able to prove the new proffered testimony admissible, the following elements need to be proved to prevail on his motion for new trial because of newly discovered evidence: (1) information was discovered after his conviction; (2) the evidence could not have been discovered earlier in exercise of reasonable diligence; (3) newly discovered witness testimony is material to the issues in the case; and (4) the evidence would have changed the result of the trial. *Romeo*, 542 N.W.2d at 550.

Whether Quinn proved he was entitled to a new trial because of newly discovered evidence is decided by analyzing elements three and four. In determining whether newly discovered evidence probably would have changed the result at trial, we examine the district court's ruling regarding the proffered new evidence in view of the strength or weakness of the States's proof of guilt. *State v. Weaver*, 554 N.W.2d 240, 249 (Iowa 1996). Quinn argues the testimony impeaches Brown's credibility as a witness and, in this way, is material and would have changed the result of the trial.

Brown's testimony was not material to Quinn's convictions for felon in possession of and carrying weapons. Quinn admitted the gun under the driver's seat was his and he knew the gun was in his jacket pocket when he entered Brown's house. Brown's testimony in regard to the terrorism and the false imprisonment charges was corroborated by testimony from other witnesses, including defense witnesses. At best, the new proffered evidence would impeach Brown, but would not have changed the jury verdict. The district court evaluated the newly discovered evidence and assessed the credibility and weight of the new witnesses' testimony against the complete trial record and was in a good position to determine what evidence would and would not probably change the result at trial. *Weaver*, 554 N.W.2d at 250. The testimony of Quinn's wife and sister is not material to the issues in the case and would not have changed the result of the trial. For these reasons, the trial court did not abuse its discretion in denying the motion for new trial.

III. Reasons for Sentence.

Quinn contends the district court abused its discretion in running his sentences consecutively and the court did not articulate sufficient reasons for imposing consecutive sentences. Our standard of review on this issue is for abuse of discretion. "To show an abuse of discretion, the defendant must demonstrate the court's sentencing decision was based on clearly untenable grounds or reasons, or the court

exercised its discretion to an extent clearly unreasonable." *State v. Adams*, 554 N.W.2d 686, 693 (Iowa 1996).

The trial court must state on the record its reasons for selecting a particular sentence in a criminal case. *State v. Delaney*, 526 N.W.2d 170, 178 (Iowa App. 1994). The reason does not have to be a detailed one, but must be sufficient enough for an appellate court to review the trial court's discretion in sentencing. *Id.* A trial court has discretion to impose consecutive sentences for convictions on separate counts, but must give an explanation for imposing the sentences consecutively. *Id.* We will look to all parts of the record for supporting reasons. *Id.*

In this case, the sentencing court made the following statement after pronouncing sentences of incarceration on each separate count: "Probation has been considered in this matter, Mr. Quinn, but it's denied because of your past criminal history and because I think it would unduly lessen the seriousness of this crime--of the offenses." No explanation was given for why the sentences were imposed consecutively. In the subsequent sentencing order the court included this statement: "Granting of probation in this case is denied because of defendant's prior criminal history and because it would unduly lessen the seriousness of the offense."

This is an explanation for denying probation. *See id.* The court did not say why it was imposing consecutive sentences. More explanation is required for us to

perform our review. We remand for resentencing, but do not take a position on what the sentence should be. We do not retain the case.

IV. Ineffective Assistance of Counsel.

Quinn argues his attorney should have objected to questions the State asked him about his financial affidavit used to obtain court-appointed counsel on "grounds of prejudice." Quinn also asserts his attorney violated his duty to make a reasonable investigation, and should have located more favorable defense witnesses by the trial date.

Generally, ineffective assistance of counsel claims are preserved for postconviction proceedings to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to decide whether counsel was ineffective. This issue is preserved for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.